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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DAVID and JENNIFER WALLACE.	B289537, B292640, B293412
DAVID WALLACE, Respondent, v. JENNIFER WRAY, Appellant.	(Los Angeles County Super. Ct. No. SD033396)

APPEALS from orders of the Superior Court of Los Angeles County, Dean H. Hansell, Judge. Affirmed.

Jennifer Wray, in pro. per., for Appellant.

David Wallace, in pro. per., for Respondent.

These appeals arise out of a child custody dispute between David Wallace (father) and Jennifer Wallace (mother) (together, parents) over their five-year-old daughter. Mother appeals from a series of postjudgment orders requiring her to enroll the child in a kindergarten near her home in Arizona, vaccinate her, and prohibiting police presence at curbside custody exchanges at the airport. For the reasons set forth below, we affirm the trial court's orders.

BACKGROUND

Following dissolution of their marriage, parents agreed on a settlement and the trial court entered a stipulated judgment. Under the terms of the judgment, parents shared joint legal and physical custody over the child. However, mother retained primary physical custody and was permitted to move with the child from Los Angeles to Tucson, Arizona. The judgment also granted father substantial visitation rights, allowing the child to stay with father in Los Angeles every other weekend. Custody exchanges were to take place curbside at Los Angeles International Airport (LAX) with some limited exceptions.

Within one week of entry of judgment, mother filed requests for orders to reduce father's visitation from two visits in Los Angeles per month to one, suspend father's vacations with the child until further notice, and order father to reimburse mother for travel-related expenses. Mother also asked the trial court to modify that portion of the judgment requiring her to text father upon arrival at the airport so that she would only have to do so when necessary.

At the hearing, the trial court deferred ruling on most of mother's requests, finding that a full evidentiary hearing on the merits was necessary. However, the trial court attempted to

resolve the balance of parents' issues that day. After the trial court ruled on mother's reimbursement requests, father told the trial court that mother approached law enforcement officers at the airport while she was with the child, asking them to accompany her to the custody exchange. As parents agreed that there had been no violence at any of the prior custody exchanges, father asked that there be no police presence at custody exchanges. Mother objected to the trial court's consideration of the issue because father had not given her notice. Over mother's objection, the trial court ordered that law enforcement should be involved in custody exchanges only when absolutely necessary. This order is the subject of mother's first appeal.

Several months later, mother filed additional requests for orders allowing her to enroll the child in a homeschool program for kindergarten, reducing father's visitation from two weekends per month to one, and making other adjustments to father's visitation to accommodate the child's school schedule. Father responded that he wanted the child to attend a public elementary school near his home in Los Angeles. He expressed concern that homeschooling would be detrimental to the child's social development and questioned mother's qualifications as a homeschool teacher.

At the hearing, the trial court noted that kindergarten was a critical juncture in the child's life and asked the parents to brief their school preferences. The trial court indicated that its decision would rely on a number of factors including the caliber of education, but ultimately, the decision would come down to the child's best interests.

The parents submitted their first round of briefing on school choice. Father also asked for the authority to vaccinate

the child as a prerequisite to her enrollment in school. The trial court found that the parents submitted sufficient information regarding homeschooling and father's local elementary school, but that neither parent provided enough information about other kindergarten programs in or around Tucson so it asked for supplemental briefing.

The parents submitted their supplemental briefs. Mother identified two kindergartens in her area that she found suitable for the child. Father spoke favorably of two charter schools in the Tucson area, but otherwise reiterated his position that the child should attend his local elementary school in Los Angeles.

The trial court found that it was in the child's best interest to remain in Tucson, but warned that her schooling arrangement "should not be used as a back door way to reduce [father's] visitation time." The trial court rejected homeschooling and ordered mother to enroll the child in one of the kindergartens in the Tucson area. The August 29, 2018 order states: "School. The Court modifies legal custody to give mother the choice of schools, limited to one of the schools that she or [father] identified in their supplemental briefs." The trial court also ordered mother to enroll the child immediately and to vaccinate the child in accordance with California and Arizona law.

In defiance of the trial court's orders, mother enrolled the child in a homeschool program in Arizona. Shortly thereafter, mother filed her second appeal and an ex parte application to modify father's visitation to accommodate the school's schedule. At the hearing, the trial court expressed surprise that mother enrolled the child in a homeschool program even though she was ordered not to. Mother claimed confusion about the trial court's prior order regarding school choice, stating that the homeschool

program had been identified in the parents' supplemental briefs. She also stated the child was not old enough to attend any of the Tucson area kindergartens that the parents had identified. The trial court admonished mother and pointed out that it had asked for briefing to identify suitable schools near mother and not to perform an "academic exercise about . . . , you know, hypothetically, what schools you like in Tucson." The trial court issued another order on September 21, 2018, which ordered parents to enroll the child in one the kindergartens identified in the parents' supplemental briefs other than a homeschool program. Mother filed her third appeal.[1]

DISCUSSION

As noted above, mother filed three separate notices of appeal.[2] Mother's first appeal challenges the trial court's order prohibiting police presence during curbside exchanges at the airport. Mother's second and third appeals challenge the trial court's orders limiting her school options to one of the public or charter schools in the Tucson area and requiring her to vaccinate the child.

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[1] Mother's second and third appeals were consolidated as both raise the same issues related to school choice and vaccination.

[2] Father also makes a number of requests for the first time in his respondent's brief, mainly, that we should grant father primary physical custody and overrule the prior move-away order that allowed mother and the child to move to Tucson. These issues are not properly before us.

I. Standard of review

" 'Family law cases "are equitable proceedings in which the court must have the ability to exercise discretion to achieve fairness and equity." ' " (*In re Marriage of Boswell* (2014) 225 Cal.App.4th 1172, 1175.) Therefore, we review custody and visitation orders for an abuse of discretion. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) "[W]e must uphold the trial court 'ruling if it is correct on any basis, regardless of whether such basis was actually invoked.' " (*Ibid*.) "Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child. The court and the family have 'the widest discretion to choose a parenting plan that is in the best interest of the child.' [Citation.] When determining the best interest of the child, relevant factors include the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents." (*Ibid*.)

II. Police presence at custody exchanges

Mother argues that Family Code[3] section 213 prohibited father from raising the issue of police presence at custody exchanges at the airport for the first time in his responsive declaration.

Section 213, subdivision (a) states that, in a proceeding in which child custody or visitation is at issue, "the responding party may seek affirmative relief alternative to that requested by the moving party, on the same issues raised by the moving party,

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[3] All further statutory references are to the Family Code.

by filing a responsive declaration within the time set by statute or rules of court." "[S]ection 213's restrictions on affirmative relief are aimed at keeping each modification proceeding limited in scope to the substantive issues raised in the moving papers, much as a civil lawsuit is confined to the claims for affirmative relief raised in the complaint, [citation] and cross-examination is confined to the substantive areas raised during direct examination [citation]. By requiring a responding party seeking to expand the substantive scope of issues placed before the court by the moving party to file a separate motion to modify, section 213—as our Legislature noted when enacting its predecessor statute—'consolidate[s] all motions on the same issues into one court hearing, thereby saving time and expense.' " (*In re Marriage of Perow & Uzelac* (2019) 31 Cal.App.5th 984, 990.) "[T]he bar to seeking affirmative relief in responsive pleadings is intended to keep the modification proceeding focused on the 'message' set forth in the moving papers, a responding party seeks affirmative relief only if [he or] she seeks to change or expand that message." (*Ibid.*)

With these principles in mind, we must decide whether father's request regarding police presence at curbside custody exchanges at LAX was an affirmative form of relief alternative to that requested by mother. We conclude that it was. Mother asked the trial court to modify the judgment to allow her to text father upon landing and disembarking at LAX only when necessary. Thus, the manner of custody exchanges at the airport was properly before the trial court and father was entitled to ask for relief related to those exchanges.

III. School choice

Mother makes several challenges to the trial court's order denying her request for homeschool and requiring her to enroll the child in a kindergarten in Tucson. We address each argument in turn.

First, mother contends that the order violates due process and her fundamental right to direct the child's upbringing. She relies on United States Supreme Court cases which discuss the rights of parents to control the education of their children. (See, e.g., *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534–535 [striking down Oregon statute making public school compulsory for children between ages eight and 16]; *Meyer v. Nebraska* (1923) 262 U.S. 390 [invalidating statute prohibiting instruction in languages other than English].) These authorities, however, have no bearing here as they do not address instances where parents share joint legal custody but disagree on a critical decision regarding their child's education. While due process protects the fundamental right of parents to make decisions concerning the care, custody and control of their children (*Troxel v. Granville* (2000) 530 U.S. 57, 66) in a custody dispute, the trial court must balance the rights of two fit parents who each have the same constitutional right to custody of their children (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1378–1379).

Mother and father have joint legal and physical custody over the child. When parents cannot agree and the trial court must make a decision about child custody, the trial court's primary concern is the best interest of the child. (§ 3020 subd. (a).) The trial court must consider, among other things, which parent is more likely to allow the child frequent and

continuing contact with the noncustodial parent. (§ 3040, subds. (a)(1) & (c).) As the trial court indicated in its order, it was concerned that the child's school schedule might serve as an indirect way for mother to reduce father's visitation, which was not in the child's best interest because she had a "capable and caring father." By ordering the child not to be homeschooled but to attend a school in Tucson rather than Los Angeles, the trial court reached a compromise between two parents that "can't agree on what day of the week it is." It was not a violation of mother's right to due process.

Second, mother argues that the order was not based on substantial evidence or alternatively that the trial court did not exercise informed discretion. Not so. Both mother and father submitted detailed analyses of their school preferences. The trial court gave mother ample opportunity to advocate for her school preference, which she did in the three rounds of briefing on the issue.

Third, mother contends that the trial court's consideration of the school choice issue was, in fact, a potential modification of custody, which was not before the trial court under section 213. Mother ignores that she was the one who initially requested to enroll the child in a homeschool program without father's consent, which would have resulted in a modification in father's visitation. Thus, section 213's limitations on father's responsive pleading do not apply. Mother mischaracterizes the trial court's consideration of whether the child should attend kindergarten in Los Angeles or Tucson as a complete reversal in custody which would have required a showing of changed circumstances. Mother and father have joint legal and physical custody over the child. Had the trial court ordered the child to attend

kindergarten in Los Angeles, it would have been a modification in physical custody, not a "complete reversal" as mother contends. But, even accepting mother's characterization of the proceedings, there had indeed been a change in circumstances because the child was reaching the age of compulsory education and the question of a suitable kindergarten arose.

Fourth, mother contends that the trial court never denied the request to homeschool the child. Again, this is false. Mother focuses on the August 29, 2018 minute order which limited her school choice to one of the elementary schools she and father identified in their supplemental briefs. However, per the reporter's transcript and the August 29 and September 21, 2018 minute orders, the trial court unequivocally excluded homeschool as an option. Mother's argument attempts to obfuscate the trial court's rulings to circumvent its order denying homeschool.

IV. Vaccinations

Finally, we reject mother's argument that vaccinating the child was not at issue because it was not an alternative form of relief to her request to enroll the child in a homeschool program. Vaccinations are directly related to the child's ability to attend school. California and Arizona generally require children to be vaccinated before attending school.

DISPOSITION

The orders are affirmed. David Wallace is awarded his costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.